1980

Lloyd Branch And Jeanne Branch v. Western Petroleum, Inc. : Appellant's Reply Brief And Response To Cross-Appeal

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

LLOYD BRANCH and JEANNE BRANCH,

Plaintiffs-Respondents and Cross-Appellants,

v.

WESTERN PETROLEUM, INC.,

Defendant-Appellant and Cross-Respondent.

APPELLANT'S REPLY
RESPONSE TO CROSS

Appeal From the
of the Fourth Judicial
of Duchesne
The Honorable J. [illegible]

GEORGE E. MANGAN, ESQ.
HERBERT WILLIAM GILLESPIE, ESQ.
MANGAN & GILLESPIE, A.P.C.
P. O. Box 246
Roosevelt, Utah 84066
Attorney for Plaintiffs-Respondents
and Cross-Appellants.

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APPELLANT'S REPLY BRIEF AND RESPONSE TO CROSS-APPEAL

POINT I. THE POSITION OF THE TRIAL COURT AND THE PLAINTIFFS THAT THE OPERATION OF A FORMATION WATER DISPOSAL POND IS AN ULTRA-HAZARDOUS ACTIVITY IMPOSING STRICT LIABILITY ON DEFENDANT, IS NOT SUPPORTED BY ANY EVIDENCE IN THE CASE, AND IS CONTRARY TO THE LAW OF AMERICAN JURISDICTIONS WHICH HAVE CONSIDERED THE ISSUE.

The central issue in this case, and the issue upon which the questions raised by Defendant concerning negligence, proximate cause and comparative negligence, is whether the law governing the use of oilfield formation water disposal pits is strict liability based on ultra-hazardous activity or traditional negligence law. The decision on that point resolves most of the remaining points on the appeal.

Despite the fact that both parties requested instructions to the jury on negligence and proximate cause, (R. 67,77,79,94 and 97), the trial court decided that the law of strict liability applied. In discussing the law to be applied in the case with counsel during the trial, the following dialogue occurred when Defendant's counsel insisted that a finding of negligence by the jury was necessary and proper:

> Mr. McKeachnie: Your Honor, this fact situation comes up every day in Rural Utah in irrigation water, where my water escapes from my property and goes into my neighbor's basement, or onto my neighbor's fields; and the test there is the test of negligence.
>
> The Court: Well, now wait just a minute.
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> Mr. Mangan: You've got a different situation here.
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> The Court: I think that a test of negligence is --
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> Mr. McKeachnie: The test there is: Did I act as a reasonably prudent irrigator to control my water.
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> The Court: Well, the point is that if you did everything that a reasonable prudent person could to control the water, then it's not your fault that it goes onto somebody else's ground. That's what you are talking about, is it's somebody else's fault that it goes there. It isn't an act of God --well, it could be an act of God, but it's somebody else's fault, either an act of God, or somebody else's fault that the water gets on there.
>
> Mr. McKeachnie: But I was intentionally applying the water to my property.
>
> The Court: All right. But if you are intentionally irrigating your ground and -- well, let's put it this way: That's a different story.

Mr. Mangan: Unlawful act.

Mr. McKeachnie: Why is it different?

The Court: No. Where you know or have reason to believe, and the jury's got to decide that case, that's a different color of a horse than putting something in a pit that seeps down into the other guy's property. You've got a right to have him quit doing that.

Mr. McKeachnie: The test is still negligence.

The Court: No. The test is not negligence at all, where it's a willful act such as that.

Mr. McKeachnie: Well, what's the "willful"?

The Court: Doing it.

Mr. McKeachnie: Intentionally deposit the water?

The Court: Yes.

Mr. McKeachnie: All right. But aren't you intentionally putting the water on your property?

The Court: No. What you want to say is, and what I want to say is, that there's a difference in intentionally putting the water on your crop and intentionally putting the water on somebody else's land.

Mr. McKeachnie: Okay. And you say we are intentionally doing that?

The Court: Well, yes. Well, it's a jury question. If it seeps down through and goes onto the other guy's land, then you are intentionally putting the stuff into his well.

Mr. McKeachnie: Just by virtue of the fact that it goes there?

The Court: Sure, if that's what happened.

Mr. McKeachnie: How is that different than irrigating on a hill where it comes out down below? That happens every day.

The Court: If you are irrigating on a hill and the water gets away from you, I think it's the same kind of thing; because the originally reasonable and prudent person would know that to put x-second-feet of water on a hillside is to get away and go on to somebody else's ground.

Mr. McKeachnie: If the ordinary prudent man passes the test, we'll live with that.

The Court: No, that isn't the test there. The test is, there's no negligence question in this case, in my judgment, and that's the way that it's going to be.

Mr. Mangan: I agree with that.

Mr. McKeachnie: Suppose that unbeknownst to Western Petroleum --

The Court: And if that's error, I give you a real clear shot at it, because I can't equivocate in that regard. I've already stated that negligence is not involved in this case.

Mr. McKeachnie: If that's the case, then what you are doing is saying that anybody that's in the water hauling business that uses a pit has strict liability.

The Court: Anybody that pollutes somebody else's well has strict liability. There isn't any doubt about it in my mind.

. . . .

Mr. McKeachnie: We are making a strange mixture of comparative negligence.

The Court: No. No. No. No. No. There's no comparative negligence at all.

Mr. McKeachnie: I'm lost. I don't understand it.

The Court: Negligence hasn't anything to do with it.

Mr. McKeachnie: But that's the only contention in which percentages come up.

The Court: No, it isn't, because if the well is being contaminated by two sources, I want to know how much is being contaminated by one source and how much by the other.

Mr. Mangan: See, and that's not negligence, that could both of them be strict liability.

. . . .

The Court: And I'm sorry that you don't agree with me, particularly you, that negligence is not involved in this case.

Mr. Allred: I'm sorry, Judge, but I've read three A.L.R.'s and everyone of them says that's the theory to use.

. . . .

Mr. McKeachnie: What we are talking about in the general concept of tort law then is you are defining this activity as an ultra-hazardous activity.

The Court: As a matter of fact, that's about what I'm saying.

Mr. McKeachnie: So that whatever happens, it's such a risky activity that whatever happens that goes wrong, you pay?

The Court: Right, under the facts of this case. He may be right as far as the general questions of negligence is concerned. But under the facts of this case, what they are doing there is so risky and so ultra-hazardous as far as pollution is concerned that there's just liability if --

Mr. McKeachnie: What they are doing, everybody else is doing.

The Court: Yes. And that's, as far as I'm concerned, that, as the law, would be applicable to them, too. I just don't think you can pollute somebody's well and escape liability for it because you were doing what a reasonable and prudent person would do under the same or similar circumstances.

Mr. McKeachnie: What factors --

> The Court: Because it may get blown up. If you are engaged in, as we had a case, in making explosives and one thing and another and the explosives get away and cause damage to somebody, I think you are liable.
>
> Mr. McKeachnie: Well, that's standard law. But the law hasn't classified this activity. (T. 385-410)

. . . .

The Plaintiffs have asked this Court to sustain the trial court and hold that, "Defendant was strictly liable for the results of its act of intentionally conducting an ultra-hazardous activity...." To adopt this position would be to adopt the antiquated and repudiated doctrine of Rylands v. Fletcher, L.R. 3 H.L. 330. The authorities the Plaintiffs rely on for their position, Edwards v. Talent Irrigation District, 280 Or. 307 (1977); 570 P.2d 1169, Drake v. Smith, 337 P.2d 1059 (Wash. 1959); 142 A.L.R. 1322; and, 28 A.L.R.2d 1075, 1087 (1953), do not support their position and did not consider the issue. See, the discussion of those cases at Point II. The jurisdictions which have considered the same facts and issues that are before this Court have uniformly held that the plaintiff's recovery must be based upon a theory of either negligence or nuisance. United Fuel Gas Co. v. Sawyer, 259 S.W.2d 466 (Ken. 1953); Turner v. Big Lake Oil Co., 96 S.W.2d 221 (Tex. 1936); General Crude Oil Co. v. Aiken, 344 S.W.2d 668 (Tex. 1961).

The court in Turner v. Big Lake Oil Co., supra, illustrate

the strong policy supporting the rejection of the contention that the operation of evaporation ponds constituted an ultra-hazardous activity which should give rise to strict liability when that court stated that:

> The primary question for determination here is whether or not the defendants in error, without negligence on their part, may be held liable in damages for the destruction or injury to property occasioned by the escape of salt water from ponds constructed and used by them in the operation of their oil wells.
>
> . . . .
>
> [T]he immediate question presented is whether or not defendants in error are to be held liable as insurers, or whether the cause of action against them must be predicated upon negligence. We believe the question is one of first impression in this court, and so we shall endeavor to discuss it in a manner in keeping with its importance.
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> . . . .
>
> Upon both reason and authority we believe that the conclusion of the Court of Civil Appeals that negligence is a prerequisite to recovery in a case of this character is a correct one. Id, at 221-222.

In holding that Rylands v. Fletcher, L.R. 3 H.L. 330, was not good precedent for that type of case, the Texas court stated:

> While the rule has been followed to some extent in this country, in general the American courts base liability, where dams have broken, on negligence, either in the original construction of the reservoir or in failing properly to provide against all such contingent damages as might reasonably be anticipated.
>
> . . . .

> Accordingly it [the rule in Rylands v. Fletcher] has not met with general acceptance in this country; most of the authorities holding that liability for such injuries must be based upon negligence or other culpability on the part of the person sought to be responsible. The authorities are so numerous as to make a review, or even the citation of them all, impracticable.
>
> . . . .
>
> There is nothing unlawful in collecting water for such purposes; and hence, in case it escapes and does mischief, the person so collecting it can only be held liable on the ground of something unlawful in the manner in which he has built or maintained his structure,-that is, on the principle of negligence. Id, at 222-224.

The Texas court, after an in-depth analysis of Rylands v. Fletcher, rejected that doctrine finding that (a) the doctrine was generally repudiated in the United States, (b) that the case and the conditions were factually different than the conditions which gave rise to the case in England, and (c) that liability based upon negligence rather than absolute liability was the rule adopted by the majority of jurisdictions in America. Id 226.

The record in this case is completely barren of any evidence even remotely indicating that the placing of formation water in evaporation pits is an ultra-hazardous activity which cannot be adequately regulated by the traditional concepts of fault. To the contrary, all evidence before the Court indicated that what Defendant was doing was a usual and customary activity in oilfield operations and that there are no inherent dangers involved and that it may be safely conducted if done in a reasonable and prudent manner.

Adoption of the Respondents' position that the Defendant is strictly liable would be to adopt a rule long since repudiated, would be contrary to the evidence and would reject the position taken by courts which have considered the issue before this Court.

POINT II. THE AUTHORITIES AND FACTS THE PLAINTIFFS CITE TO SUPPORT THEIR ARGUMENT THAT DEFENDANT VIOLATED STATE LAW, THAT THE DEFENDANT'S ACTIVITIES WERE WILLFUL AND WANTON AND THAT THE DOCTRINE OF STRICT LIABILITY SHOULD APPLY DO NOT SUPPORT THE PLAINTIFFS' POSITION, AND ARE TAKEN OUT OF CONTEXT AND WERE REJECTED BY THE COURT.

Plaintiffs' continuous assertions that Defendant's operation of its formation water evaporation pit violated State statute, e.g. Plaintiffs' brief, pages 13-14, are not supported by any finding of the jury and, in fact, were specifically rejected by the Court when it refused to instruct the jury that such a violation had occurred, concluding that the part relating to permits did not apply to this particular fact situation. (T. 397 lines 15,16,17) Plaintiffs made numerous attempts over a period of years to enlist the aid of the State of Utah in their dispute with Defendant. Despite such efforts, the record clearly indicates that the State took no action to prosecute Defendant for violating State law or regulations or to require a cessation of Defendant's business. To the contrary, the record shows that Defendant met with State officials and had discussions regarding the pit, participated with the State in a dye test to see if formation water from the pond was entering into Plaintiffs' well, and otherwise acted in a reasonable manner whenever the State officials communicated with it. (T. 112,153; Exhibits 12, 24) Plaintiffs failed to prove their claims of unlawfulness at trial and their

reassertion of those claims here do not fairly reflect the outcome of the case in the Court below.

Likewise, Plaintiffs' version of the facts, as argued in their brief, constantly charging willful and wanton conduct on the part of Defendant, deviates substantially from the facts disclosed by the record. Even Plaintiffs' counsel, in his final argument to the jury, realized that willful and malicious conduct had not been proven when he said:

> Now that 'willful and malicious' is a hard thing to prove and talk about. And I don't think that Mr. Kay would go up there and say, I'm going to go pollute Branches' well. That sounds like willful and malicious. But a reckless indifference and a disregard, that I think has been proven. (T. 503)

Plaintiffs rely on Exhibit 38 in claiming that Defendant was violating an order of the State. That letter was not an order and was not sent by either the State Water Pollution Board or the Oil, Gas & Mining Division which regulates oil and gas activities. The Defendant's agents never received the letter. (T. 152,193) The writing on Exhibit 38 states, "I am not sure this letter was sent." The party who allegedly sent the letter visited the pit several times after the letter was sent and took no further action and the agencies which have authority over these types of activities made no effort over a period of years following the claimed order to halt the Defendant's activi-

ties but instead, indicated the pit was satisfactory or worked with the Defendant to determine if the formation water was percolating into the underground water system. (T. 81,152,193)

The Court also hesitated in allowing the punitive damages found by the jury when, after trial, it reduced the jury finding of punitive damage of $13,000.00 to $5,000.00. (R. 258) The Court later changed its mind and deleted the $10,000.00 award for discomfort and annoyance and let the punitive damage award stand. (R. 259) The Court should not be misled by Plaintiffs' assertions of fact which are not supported by the record.

On a similar point, the authorities used to support Plaintiffs' position in their brief often lack any relevance to the proposition for which they are cited. For example, on page 12 of Plaintiffs' Brief, in support of the proposition that the law of negligence does not apply, the Plaintiffs rely on Edwards v. Talent Irrigation District, 280 Or. 307 (1977); 570 P.2d 1169; Drake v. Smith, 337 P.2d 1059 (Wash. 1959); 142 A.L.R. 1322; and, 28 A.L.R.2d 1075, 1087 (1953). Even a cursory reading of those authorities reveals that they do not stand for the proposition asserted. In Edwards v. Talent Irrigation District, supra, the defendant's recovery was premised on a finding that the plaintiff was negligent which is the majority rule and the position of the

Defendant. Drake v. Smith, supra, was based on the theory of nuisance and the issue before that court involved the question of permanent depreciation. 142 A.L.R. 1322 is a compilation of cases considering whether damages for discomfort, annoyance, etc., can be awarded in nuisance cases. 28 A.L.R.2d 1075 considered cases discussing damage awards for shock due to witnessing property damage.

The authorities and facts cited by the Plaintiffs are often taken out of context and do not support the proposition advanced by the Plaintiffs. Defendant would request the Court to carefully consider the facts of the case and the authorities cited.

POINT III. DEFENDANT SHOULD HAVE BEEN GRANTED A HEARING TO DETERMINE WHETHER THE JURY SELECTION WAS PROPER AND, IF NOT, WHETHER THE DEFENDANT WAS PREJUDICED.

Plaintiffs assert that Defendant must show that it has sustained "actual and substantial injustice and prejudice" before it would be entitled to a new trial on the grounds of improper jury selection. Defendant's point on appeal is that it has been denied the opportunity to make that showing. Defendant should be granted a hearing to allow it to make the necessary showing as provided in Utah Code Ann. §78-46-16(2).

POINT IV. THE COURT SHOULD APPORTION THE DAMAGES ACCORDING TO THE PERCENTAGE OF POLLUTION ATTRIBUTED BY THE JURY TO THE DEFENDANT AND TO OTHER THIRD PARTIES AND CONDITIONS IF THE DEFENDANT IS STRICTLY LIABLE.

The damages, if any, awarded to the Plaintiffs should be reduced by the percentage of negligence attributable to Plaintiffs and other parties pursuant to this State's comparative negligence statute. If the Court were to pronounce the law of strict liability as governing this case, a proposition which Defendant strongly resists, then the damages should be apportioned based on the percentage of pollution caused by each party. It would be wrong to hold the Defendant liable for the entire damages when the jury has determined that the Defendant was responsible for only part of the pollution. Monroe Corp. Pond Co. v. River Raisin Paper Co., 240 Mich. 279, 215 N.W. 325 (1927); R. Clark Water and Water Rights §219.3(B); and, Restatement of Torts Second §433A (1965).

The Plaintiffs' argument that if the total dissolved solids in Plaintiffs' well water is multiplied by the percentage pollution attributed to Defendant, then Defendant is responsible for all dissolved solids above health standards is not logically or scientifically sound and it is not supported by the evidence nor the jury instructions. The major fallacy in Plaintiffs' argument is that pollution and total dissolved solids are

not synonymous. (T. 128-129) Plaintiffs called Mr. Richards, a chemist, who stated that water could have a high level of certain substances such as sugar which would not be harmful, while a very low level of mercury or other toxic substances could be deadly and still be below any health standard for dissolved solids. (T. 128-129) The Court recognizing the difference between pollution and total dissolved solids instructed the jury that the term "pollution" referred to man-made alterations of the quality of water that appreciably impaired its usefulness for a particular purpose. (R. 119) If it were otherwise, both milk and orange juice would be unhealthful because of too high a level of dissolved solids. Therefore, any percentage of pollution would cause damage to the Plaintiffs. The jury, following the instruction of the Court, determined the percentage of pollution attributable to Defendant and to other parties and conditions. The jury did not determine the percentage of total dissolved solids attributable to the parties or even any particular sample.

The jury found that the Defendant was not responsible for all the damage caused to Plaintiffs' well. If the Court determines that the strict liability rule applies, the damages should be apportioned and justice requires that Defendant only be held responsible for the percentage of pollution attributed to the Defendant by the jury.

POINT V. THE RESPONDENTS FAILED TO PRODUCE ANY COMPETENT EVIDENCE TO SUPPORT THEIR CLAIM FOR DAMAGES FOR EMOTIONAL DISTRESS, DISCOMFORT AND ANNOYANCE. FURTHERMORE, THE RESPONDENTS FAILED TO REQUEST THE COURT TO INSTRUCT THE JURORS ON THE ISSUE, AND, THEREFORE, THE TRIAL COURT WAS PROPER IN DELETING THOSE DAMAGES FROM THE VERDICT DUE TO THEIR SPECULATIVE NATURE.

The Court correctly ruled at the end of Plaintiffs' case that the Plaintiffs failed to produce evidence to support their claim for damages for emotional distress, discomfort and annoyance. The Defendant, at the close of the Plaintiffs' case, moved to dismiss that claim. The Plaintiffs' counsel pointed out to the Court that its clients had testified that they had been emotionally distressed and that Mrs. Branch had left her husband and returned to Colorado at one point. The Court held that since there had been no specific showing by the Plaintiffs of the extent of the damages, that to allow the jury to return a verdict on that evidence would be to allow the jury to speculate. (T. 238-241) The Court, however, did allow the Plaintiffs to reopen their case with the opportunity to produce evidence to support their claim. The evidence which was produced by the Plaintiffs on rebuttal merely repeated the evidence that the Plaintiffs had produced the first time. At no time did the Plaintiffs produce any evidence as to the extent of the damages they suffered as a result of emotional distress, discomfort and annoyance. The Court did, however, at the insistence of the Plaintiffs, ask the jury:

> What separate damages, if any, did Plaintiffs suffer by reason of mental suffering, discomfort or annoyance resulting in the pollution of Plaintiffs' wells, if any. (J. Question No. 18, R. 139)

The jury answered $10,000.00. After considering the jury verdict, the Court again dismissed Plaintiffs' claim for damages due to mental suffering, discomfort or annoyance on the basis that the jury was not instructed as to the requirements and limits for such an award, and further that such damages had not been proven and were, therefore, speculative.

The cases cited by Plaintiffs in support of their position require special circumstances such as malice and fraud, before an award can be made for mental anguish, discomfort and annoyance. Valley Development v. Weeks, 364 P.2d 730 (Colo. 1961); and, Murphy v. City of Tacoma, 374 P.2d 976 (Wash. 1962). Legal limitations must be applied to the award of such damages as pointed out by the comment (j) to §46 of the Restatement of Torts Second:

> Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.

This State has been reluctant to award damages for emotional distess. See, Samms v. Eccles, 358 P.2d 341 (1961). Therefore, before such an award can be made, the jury must

be adequately instructed so that it can make the appropriate findings which are necessary before such an award may be properly allowed. In the present case, no instruction was given to the jury defining or explaining what must be shown in order to allow damages for discomfort and annoyance. The jury was merely asked "what separate damages if any, did Plaintiffs suffer by reason of mental suffering, discomfort or annoyance resulting in the pollution of Plaintiffs' wells, if any." (Question No. 18, R. 139). To ask such a question without any instruction as to what is legally recognized as mental suffering, discomfort or annoyance was error. In assessing damages for mental suffering, discomfort and annoyance, the jury was required to speculate, since the Plaintiffs failed to produce evidence on that issue. The trial court's exercise of its discretion in deleting that claim from the judgment was proper and should be sustained.

CONCLUSION

The trial court's adoption of the strict liability doctrine of Rylands v. Fletcher was not supported by the evidence and was contrary to the law of other jurisdictions which have considered this issue. The case should be remanded to the trial court with instructions that the case be handled as a negligence case with instructions on proximate cause and comparative negligence. In the event this Court does decide that strict liability does apply, then the Court, in fairness, should apportion the damages according to the jury's finding.

The Plaintiffs failed to produce any competent evidence as to the amount of damages they sustained due to emotional distress, annoyance and discomfort. The jury was not instructed on that issue and the trial court was proper when it deleted those damages due to their speculative nature.

Appellant, therefore, submits that the jury verdict should be reversed and the matter remanded for a new trial.

Respectfully submitted this 8th day of December, 1980.

By: Gayle F. McKeachnie
Gayle F. McKeachnie

By: Clark B. Allred
Clark B. Allred

MCKEACHNIE & ALLRED, P.C.
53 South 200 East
Vernal, Utah 84078
789-4908
Attorneys for Defendant-Appellant
and Cross-Respondent

MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing brief of Defendant-Appellant and Cross-Respondent to Mr. George E. Mangan, Mangan & Gillespie, A.P.C., P. O. Box 246, Roosevelt, Utah 84066, on the 9th day of December, 1980.

Gayle McKeachnie